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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

TONY ING, Plaintiff and Appellant, v. THOMAS LEE, Defendant and Respondent.	B299769 (Los Angeles County Super. Ct. No. BC683423)

APPEAL from a judgment of the Superior Court of Los Angeles County, Mel Red Recana, Judge. Affirmed.

Law Offices of Phillip S. Hwang and Phillip S. Hwang for Plaintiff and Appellant.

Wong & Mak and Fred A. Wong for Defendant and Respondent.

INTRODUCTION

This is the third lawsuit between Tony Ing and Thomas Lee. In the first action, Lee obtained a judgment against Ing for over $1 million. In the second action, Ing sought to set against the $1 million judgment, claiming Lee procured it by fraud. The court in the second action granted Lee's special motion to strike under Code of Civil Procedure section 425.16 and dismissed the action.

In this action, the third, Ing again claims Lee procured the judgment in the first action by fraud. The trial court granted Lee's motion for judgment on the pleadings, ruling claim preclusion barred Ing's causes of action. Ing appeals. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

A. *Lee Obtains a Judgment Against Ing, and Ing Tries Unsuccessfully To Set It Aside*

In November 2011 Lee filed a lawsuit (the underlying action) against Ing seeking to recover $1 million Lee had given Ing to invest. The trial court found after a court trial that Ing induced Lee to give him the money by promising to invest it for Lee, but that Ing had no intention of doing so. The court also found Ing did not use the money for Lee's benefit. The court entered judgment in favor of Lee and awarded him $1 million in compensatory damages (plus interest) and $285,000 in punitive damages.

In May 2016 Ing filed an action (*Ing I*) against Lee, the attorneys who represented Lee in the underlying action, and Ramon Barredo, the attorney who represented Ing in the

underlying action. Ing alleged that, during the trial in the underlying action, Barredo filed a stipulation, without Ing's consent, stating that Ing did not use the $1 million Lee gave Ing for Lee's benefit. Ing also alleged Lee, Lee's attorneys, and Barredo "acted in concert" to conceal the stipulation. Ing asserted causes of action for, among other things, fraud, misrepresentation, and deceit. Ing alleged that the judgment in the underlying action was void and that he was entitled to monetary damages.

Lee and Lee's attorneys filed a special motion to strike under Code of Civil Procedure section 425.16,[1] which in September 2016 the court granted. The court ruled that under the first step of the section 425.16 analysis Ing's causes of action against Lee and Lee's attorneys arose from protected petitioning activity and that under the second step of the analysis Ing did not demonstrate a probability of prevailing on his causes of action because Ing "failed to lodge any admissible evidence in opposition" to the special motion to strike.[2] The court subsequently dismissed the action against Lee and Lee's attorneys.

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[1] Undesignated statutory references are to the Code of Civil Procedure.

[2] Barredo also filed a special motion to strike under section 425.16. The court denied the motion, ruling the causes of action against Barredo did not arise from protected activity under section 425.16.

B. *Ing Files This Action Against Lee (Ing II)*

In November 2017 Ing filed this action against Lee, again asserting causes of action arising from the stipulation in the underlying action. Ing alleged Barredo entered into the stipulation without Ing's consent after Lee "bribed" Barredo. Ing asserted causes of action for unfair competition in violation of Business and Professions Code section 17200 and intentional interference with contractual relations. Ing sought an order setting aside the judgment in the underlying action and again sought monetary damages.

C. *The Trial Court Grants Lee's Motion for Judgment on the Pleadings*

In April 2019 Lee filed a motion for judgment on the pleadings, arguing Ing's causes of action in *Ing II* were barred by claim preclusion because Lee prevailed in *Ing I* when the trial court granted his special motion to strike under section 425.16 and dismissed the complaint against him. Ing argued claim preclusion did not bar his causes of action because he had obtained new evidence since the court in *Ing I* granted the special motion to strike. In particular, in June 2017 and November 2017 Barredo signed declarations stating that he entered into the stipulation in the underlying action without Ing's authority, that Lee "induced" him to do so, and that he "was financially influenced to do so."

The trial court granted the motion for judgment on the pleadings. The court ruled that the order granting Lee's special motion to strike in *Ing I* was a final judgment on the merits for purposes of claim preclusion, that Ing's causes of action in *Ing II* were based on "the same factual set of circumstances" alleged in

Ing I, and that Ing "could have asserted either of the causes of action in this matter in the previous [c]ase . . . ." The trial court also denied Ing's request for leave to amend the complaint and entered judgment in favor of Lee. Ing timely appealed.

DISCUSSION

A. *Applicable Law and Standard of Review*

A defendant may move for judgment on the pleadings where "[t]he complaint does not state facts sufficient to constitute a cause of action against that defendant." (§ 438, subd. (c)(1)(B)(ii)); see *Hudson v. County of Los Angeles* (2014) 232 Cal.App.4th 392, 407 ["A defense motion for judgment on the pleadings 'is akin to a demurrer and is properly granted only if the complaint does not state facts sufficient to state a cause of action'"].) "In addition to the facts alleged in the complaint, the court may consider matters which may be judicially noticed, including court records." (*Consolidated Fire Protection Dist. v. Howard Jarvis Taxpayers' Assn.* (1998) 63 Cal.App.4th 211, 219; see *City of Warren Police & Fire Retirement System v. Natera Inc.* (2020) 46 Cal.App.5th 946, 953 ["'[c]ourts may consider judicially noticeable matters'" in ruling on a motion for judgment on the pleadings]; *Wedemeyer v. Safeco Ins. Co. of America* (2008) 160 Cal.App.4th 1297, 1301, fn.1 ["In reviewing a judgment on the pleadings, the facts are those set forth in the pleadings and those of which judicial notice may be taken."].) Judgment on the pleadings is proper where claim preclusion bars the plaintiff's causes of action. (See *Colombo v. Kinkle, Rodiger & Spriggs* (2019) 35 Cal.App.5th 407, 420; *Atwell v. City of Rohnert Park* (2018) 27 Cal.App.5th 692, 698, 705; see also *Flood v. Simpson*

(1975) 45 Cal.App.3d 644, 647, 650-651 [judgment on the pleadings was appropriate where issue preclusion barred plaintiff from contending a prior judgment against him was procured by fraud and deceit].)

"'"The standard of review for a motion for judgment on the pleadings is the same as that for a general demurrer: We treat the pleadings as admitting all of the material facts properly pleaded, but not any contentions, deductions or conclusions of fact or law contained therein . . . ."'" (*Tarin v. Lind* (2020) 47 Cal.App.5th 395, 403-404; see *Burd v. Barkley Court Reporters, Inc.* (2017) 17 Cal.App.5th 1037, 1042.) "'"We review the complaint de novo to determine whether it alleges facts sufficient to state a cause of action under any theory."'" (*Tarin*, at p. 404; *Burd*, at p. 1042; accord, *York v. City of Los Angeles* (2019) 33 Cal.App.5th 1178, 1193; *Dondlinger v. Los Angeles County Regional Park & Open Space Dist.* (2019) 31 Cal.App.5th 994, 998.)

B. *Claim Preclusion Bars Ing's Causes of Action in Ing II*

Claim preclusion, "formerly called res judicata, 'prohibits a second suit between the same parties on the same cause of action.' [Citation.] 'Claim preclusion arises if a second suit involves (1) the same cause of action (2) between the same parties [or their privies] (3) after a final judgment on the merits in the first suit.'" (*Kim v. Reins International California, Inc.* (2020) 9 Cal.5th 73, 91; accord, *DKN Holdings LLC v. Faerber* (2015) 61 Cal.4th 813, 824.)[3]

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[3] California courts "now refer to 'claim preclusion' rather than 'res judicata'" and "'issue preclusion' in place of 'direct or

The trial court correctly ruled claim preclusion barred Ing's causes of action in *Ing II* for unfair competition and intentional interference with contract. First, Ing and Lee were both parties in *Ing I* and *Ing II*. (See *Pollock v. University of Southern California* (2003) 112 Cal.App.4th 1416, 1428, fn. 4 [same party element of claim preclusion is satisfied where the "same parties were present" in both cases].) Ing does not contend otherwise.

Second, Ing asserted the same cause of action in *Ing I* that he asserts in *Ing II*. "Although 'the phrase "causes of action" is often used indiscriminately . . . to mean *counts*'" that state different legal theories (*Hayes v. County of San Diego* (2013) 57 Cal.4th 622, 631), for purposes of claim preclusion "the phrase 'cause of action' has a more precise meaning" (*Boeken v. Philip Morris USA, Inc.* (2010) 48 Cal.4th 788, 798). "To determine whether two proceedings involve identical causes of action for purposes of claim preclusion, California courts have 'consistently applied the "primary rights" theory.'" (*Id.* at p. 797; see *Fujifilm Corp. v. Yang* (2014) 223 Cal.App.4th 326, 331-332 ["[t]he 'firmly settled rule in California for determining a cause of action is the primary rights theory'"].) Under the primary rights theory, "[t]he cause of action is the right to obtain redress for a harm suffered, regardless of the specific remedy sought or the legal theory (common law or statutory) advanced." (*Boeken*, at p. 814; accord, *Hayes*, at p. 631; *Boyd v. Freeman* (2017) 18 Cal.App.5th 847, 855.) "[T]he determinative factor is the harm suffered. When two actions involving the same parties seek compensation for the same harm, they generally involve the same primary right." (*Boeken*, at p. 798; see *Hi-Desert Medical Center v.*

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collateral estoppel.'" (*Samara v. Matar* (2018) 5 Cal.5th 322, 326.)

Douglas (2015) 239 Cal.App.4th 717, 733; *Federal Home Loan Bank of San Francisco v. Countrywide Financial Corp.* (2013) 214 Cal.App.4th 1520, 1531.)

Ing sought redress for the same alleged injury in *Ing I* for which he seeks redress in *Ing II*—an adverse judgment against him that, according to Ing, was caused by Lee, Lee's attorneys, and Barredo wrongfully agreeing to submit to the court in the underlying action a stipulation to which Ing never agreed. In his complaint in *Ing I*, Ing alleged "[t]he gravamen of the complaint is a joint unauthorized joint [*sic*] stipulation" that Lee, Lee's attorneys, and Barredo "concealed from Ing." Ing alleged that the "unauthorized joint stipulation became the pivot[al] basis of the final judgment" in the underlying action, that the stipulation "could not form the basis of a valid judgment against Ing," and that Ing lost "his litigation defense . . . as a proximate result" of the stipulation. Ing's causes of action for fraud, misrepresentation, and deceit all rested on these allegations.

In his complaint in this action Ing similarly alleged he was injured because the court in the underlying action entered an adverse judgment against him after Lee, either personally or through Lee's attorneys, agreed with Barredo to the stipulation without Ing's knowledge. (See *Boeken*, *supra*, 48 Cal.4th at pp. 798-799 ["the relevant point for our purposes is what plaintiff [in the prior action] *alleged*, because that allegation indicates what primary right was adjudicated"].) Ing alleged in this action Lee obtained a judgment against him the underlying action because Barredo "secretly submitted" the stipulation to the court after Lee or Lee's attorneys "bribed" him. Ing's causes of action for unfair competition and intentional interference with contractual relations were based on these allegations.

It is true that in *Ing I* Ing did not assert a cause of action for unfair competition or intentional interference with contractual relations. But that does not mean he asserted different causes of action in *Ing II* for purposes of claim preclusion. "'[I]f two actions involve the same injury to the plaintiff and the same wrong by the defendant then the same primary right is at stake even if in the second suit the plaintiff pleads different theories of recovery, [or] seeks different forms of relief . . . .'" (*Cal Sierra Development, Inc. v. George Reed, Inc.* (2017) 14 Cal.App.5th 663, 675; see *The Inland Oversight Committee v. City of San Bernardino* (2018) 27 Cal.App.5th 771, 779-780 [""'The plaintiff's primary right is the right to be free from a particular injury, regardless of the legal theory on which liability for the injury is based.'""].) *Ing I* and *Ing II* involved the same injury to Ing: the $1 million adverse judgment in the underlying action. And *Ing I* and *Ing II* involved the same alleged wrongs by Lee: agreeing with Barredo to submit a stipulation and concealing it from Ing.

Finally, Ing does not dispute that the order in *Ing I* granting Lee's special motion to strike under section 425.16, followed by a dismissal, was a final judgment on the merits for purposes of claim preclusion. An order "granting a motion to strike under section 425.16 results in the dismissal of a cause of action on the merits . . . ." (*Varian Medical Systems, Inc. v. Delfino* (2005) 35 Cal.4th 180, 193; see *Lockwood v. Sheppard, Mullin, Richter & Hampton* (2009) 173 Cal.App.4th 675, 682 [dismissal following orders granting special motions to strike "was on the merits"].) The order granting the special motion to strike disposed of each of Ing's causes of action against Lee in *Ing I*. (See *Montegani v. Johnson* (2008) 162 Cal.App.4th 1231,

1237 [for purposes of claim preclusion, ""'where no issue is left for future consideration except the fact of compliance or noncompliance with the terms of [an order], that [order] is final'""]; *Nave v. Taggart* (1995) 34 Cal.App.4th 1173, 1177 ["A judgment is final . . . when it terminates the litigation between the parties on the merits and leaves nothing in the nature of judicial action to be done"].)[4]

C. *Ing's Claim He Had Newly Discovered Evidence Did Not Prevent Claim Preclusion from Barring Ing II*

Ing argues claim preclusion does not apply because, after the court dismissed *Ing I*, Barredo signed declarations admitting he entered into the stipulation in the underlying action without Ing's authorization. Ing argues Barredo's declarations are the admissible evidence he did not have, and "could not have offered," in opposition to Lee's special motion to strike in *Ing I*. But a plaintiff's discovery of new or additional evidence does not prevent claim preclusion from applying. (See *Cal Sierra Development, Inc. v. George Reed, Inc.*, *supra*, 14 Cal.App.5th at p. 675 ["'if two actions involve the same injury to the plaintiff and the same wrong by the defendant then the same primary right is at stake even if in the second suit the plaintiff . . . adds new facts

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[4] The court in *Ing I* did not actually dismiss the complaint against Lee until after the court had dismissed the complaint against Barredo. Ing did not appeal from the dismissal. (See *Franklin & Franklin v. 7-Eleven Owners for Fair Franchising* (2000) 85 Cal.App.4th 1168, 1174 ["in California the rule is that the finality required to invoke the preclusive bar of [claim preclusion] is not achieved until an appeal from the trial court judgment has been exhausted or the time to appeal has expired"].)

supporting recovery'"]; *Alpha Mechanical, Heating & Air Conditioning, Inc. v. Travelers Casualty & Surety Co. of America* (2005) 133 Cal.App.4th 1319, 1332 [same]; *Estate of MacPherson* (1970) 14 Cal.App.3d 450, 456 [new evidence discovered after a judgment "do[es] not alter the res judicata effect of" the judgment]; see also *Direct Shopping Network, LLC v. James* (2012) 206 Cal.App.4th 1551, 1561 ["new evidence, however compelling, is generally insufficient to avoid application of collateral estoppel"]; *Burdette v. Carrier Corp.* (2008) 158 Cal.App.4th 1668, 1690 ["a party may not be permitted to introduce new or different evidence to relitigate a factual issue which was presented and determined in a former action"].)

Ing cites *Melendres v. City of Los Angeles* (1974) 40 Cal.App.3d 718, where the court stated that, "if new facts or changed circumstances have occurred since the prior decision, the former judgment may not bar a later suit." (*Id.* at p. 730) This rule generally applies only if the new facts or changed circumstances "'establish a previously undiscovered theory of liability'" or "'denote a change in the parties' legal rights.'" (*Direct Shopping Network, LLC v. James*, *supra*, 206 Cal.App.4th at pp. 1561-1562; see *Evans v. Celotex Corp.* (1987) 194 Cal.App.3d 741, 748.) For example, in *Melendres*, members of a city's police and fire departments filed an action to compel a city to pay increased salaries. (*Melendres*, at p. 721.) The court held a prior judgment did not preclude the plaintiffs from relitigating whether they were entitled to salary increases because, after the prior judgment, the city adopted a new ordinance that changed the method for determining the plaintiffs' compensation. (*Id.* at pp. 724, 730-731.) Here, in contrast, Barredo's declarations did not disclose a new theory of liability that Lee did not assert in

Ing I, nor did they affect Ing's rights with respect to Lee. In his complaint in *Ing I*, Ing alleged Barredo and Lee engaged in conduct that was essentially the same conduct Barredo described in his declarations. The declarations simply provided evidence for allegations Ing already asserted or could have asserted in *Ing I*. (See *Direct Shopping Network*, *LLC,* at p. 1562; [the exception for new facts or changed circumstances "'cannot be grounded'" solely "'on the alleged discovery of more persuasive evidence,'" because "'[o]therwise, there would be no end to litigation.'"]; *Evans,* at p. 748 [same].)

There is a limited exception for new facts or circumstances where the defendant was unable to obtain the testimony of a crucial witness in the prior action, but that exception does not apply here. For example, in *Smith v. ExxonMobil Oil Corp.* (2007) 153 Cal.App.4th 1407, a case Ing does not cite, the court stated "the inability of a defendant at a prior trial to obtain the testimony of an assertedly crucial witness" should not prevent the defendant from relitigating an issue if it "unfairly denied him a full opportunity to litigate his claim . . . ." (*Id.* at p. 1416.) *Smith*, however, involved issue preclusion, not claim preclusion, and specifically the offensive use of issue preclusion, where "'the plaintiff seeks to foreclose the defendant from litigating an issue the defendant has previously litigated unsuccessfully in an action with another party.'" (*Id.* at p. 1415; see Rest.2d Judgments, § 29, com. j. ["that the prior determination was plainly wrong or that new evidence has become available that could likely lead to a different result" is relevant to whether offensive issue preclusion applies]; see also *Tennison v. California Victim Comp. & Government Claims Bd.* (2007) 152 Cal.App.4th 1164, 1180 ["'[T]he offensive use of collateral estoppel is more closely

scrutinized than the defensive use of the doctrine.'"].) The rule in *Smith* does not apply here, where the defendant is using claim preclusion defensively to defeat claims the plaintiff has already litigated against the defendant and lost.

Moreover, claim preclusion generally bars a cause of action "if with diligence it could have been brought earlier." (*Allied Fire Protection v. Diede Construction, Inc.* (2005) 127 Cal.App.4th 150, 156.) Ing has not alleged, argued, or made a showing that he could not have obtained a declaration from Barredo in *Ing I*, or even that he asked Barredo for one. And while the filing of a special motion to strike under section 425.16 stays discovery, a trial court "on noticed motion and for good cause shown, may order that specified discovery be conducted . . . ." (§ 425.16, subd. (g); see *Lafayette Morehouse, Inc. v. Chronicle Publishing Co.* (1995) 37 Cal.App.4th 855, 868 ["If the plaintiff makes a timely and proper showing in response to the motion to strike, that a defendant or witness possesses evidence needed by plaintiff to establish a prima facie case, the plaintiff must be given the reasonable opportunity to obtain that evidence through discovery before the motion to strike is adjudicated."].) Ing has not alleged, argued, or suggested he made any effort to obtain the evidence necessary to show a probability of prevailing on his causes of action in *Ing I* after Lee filed his special motion to strike.

Nor has Ing alleged or argued he could have successfully opposed Lee's special motion to strike in *Ing I* even if he had Barredo's declarations. As stated, the court in *Ing I* granted Lee's motion because Ing "failed to lodge any admissible evidence" in opposition to the motion. The statements in Barredo's declarations, at most, were relevant to only some of the

elements of Ing's causes of action in *Ing I* for fraud and deceit. (See *Guessous v. Chrome Hearts, LLC* (2009) 179 Cal.App.4th 1177, 1183 [to show a probability of prevailing a plaintiff must make "'"a sufficient prima facie showing of facts to sustain a favorable judgment if the evidence submitted by the plaintiff is credited"'"].) For example, assuming that Barredo's declarations were prima facie evidence Lee concealed or failed to disclose the existence of the stipulation and that Lee had a duty to disclose it to Ing,[5] Ing still had to submit evidence in opposition to Lee's special motion to strike that, "had the omitted information been disclosed," Ing "would have been aware of it and behaved differently." (*Mirkin v. Wasserman* (1993) 5 Cal.4th 1082, 1093; accord, *Hoffman v. 162 North Wolfe LLC* (2014) 228 Cal.App.4th 1178, 1194.) Ing does not discuss this (or any other) element of his fraud and deceit causes of action in *Ing I*, and he provides no reason he could not have submitted his own declaration or other admissible evidence in support of this (or any other) element when he filed his opposition to Lee's special motion to strike. (See *Hecimovich v. Encinal School Parent Teacher Organization* (2012) 203 Cal.App.4th 450, 476 [plaintiff failed to show probability of prevailing on his fraud cause of action where he did not show reliance on the alleged misrepresentations].)

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[5] To prove fraud, the plaintiff must show a "false representation," "concealment," or "nondisclosure" by the defendant, or that the defendant made a promise he did not intend to perform. (*Robinson Helicopter Co., Inc. v. Dana Corp.* (2004) 34 Cal.4th 979, 990; see Civ. Code, § 1710, subds. (1)-(4).) Barredo's declarations did not show Lee (or Lee's attorneys) made any false representations to Ing or promised to do anything for Lee.

D. *The Trial Court Did Not Abuse Its Discretion in Denying Leave To Amend*

Ing argues the trial court abused its discretion in denying him leave to amend his complaint "even one time." While "[l]eave to amend is liberally allowed" following an order granting a motion for judgment on the pleadings (*Bettencourt v. Hennessy Industries, Inc.* (2012) 205 Cal.App.4th 1103, 1111), "'the plaintiff has the burden of demonstrating that "there is a reasonable possibility the plaintiff could cure the defect with an amendment"'" (*Rice v. Center Point* (2007) 154 Cal.App.4th 949, 959; see *King v. CompPartners, Inc.* (2018) 5 Cal.5th 1039, 1050 [on appeal of order sustaining demurrer without leave to amend, the "burden is on plaintiffs to prove that amendment could cure the defect"]). Ing has not explained how he could amend his complaint to allege a cause of action that would not be barred by claim preclusion.[6]

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[6] In the trial court Ing requested leave to amend to allege a cause of action for fraud, but he did not explain why claim preclusion would not bar a(nother) fraud cause of action.

DISPOSITION

The judgment is affirmed. Lee's request for judicial notice is denied. Lee is to recover his costs on appeal.

SEGAL, J.

We concur:

PERLUSS, P. J.

DILLON, J.*

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* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.